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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 209

COMPANHIA ATLANTICA DE DESENVOLAIMENTO E EXPLORACAO DE MINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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The Market Value Measure of Damages Applies by Operation of Law Because the Contract on its Face is a Purchase and Sale Agreement and Not a Contract for Production

Respondent's brief subtly walks around the central object to which this Court's attention should be directed namely, the contract at issue. For the convenience of the Court petitioner has printed in Appendix B to its peti-

the Court of Claims has found the prices existing at the dates on which the contract required delivery (Pet. 4).

The speculative conclusions of the Court of Claims as to how petitioner would have performed the contract not only lack any basis in its own factual findings but fail to possess legal consequence. These conclusions, and respondent's arguments in support of them, overlook the basic principles that the law does not permit a party or the courts to rewrite a contract, and that the law does permit a contracting party to change his purpose and his method of performance if the change does not conflict with what he agreed to do under his contract. This is why we consider this case, in its present posture, to rest on erroneous conceptions of fundamental law, and why we consider the obligations of the contract, as written, to be the crux of the question presented by this petition.

The contract here is clearly a simple agreement for the purchase and sale of tungsten. Article I sets out the quantities to be bought and sold. Article III specifies the rates of delivery and Article IV sets forth the price. There is no provision which expressly or impliedly requires the petitioner to produce any tungsten, obligates it to develop mines or increase Portuguese production or limits the sources from which petitioner may acquire tungsten for resale to the Government.

The utter absence of any such obligation or restriction is illuminated by respondent's failure to refer in its brief to the terms of the contract. Instead, respondent quotes what it calls the "underlying promises" of the contract (in other words, the recitals in the preamble to the contract (Resp. 6). Such recitals, however, do not constitute contract obligations. Indeed, when the recitals in a contract are inconsistent with the obligations expressed

in the body of the contract, the recitals must give way. . . ." *Wilson v. Travers*, 56 Fed. 2d 139, 143 (4th Cir. 1932); *Barnes v. Brooklyn*, 165 N. Y. 80, 58 N. E. 765 (1900). Respondent's reliance on the recitals is an admission that it cannot find anything in the contract to elevate the "desires" expressed in the preamble to the status of contract obligations.

Respondent's brief points to no contract term claimed to be unclear or ambiguous. There is no reason why this Court should not determine from mere inspection of the provisions printed in Appendix B that the contract is an unrestricted purchase and sale agreement to which the market value rule applies, not as a means for determining cost of performance (as concluded by the Court of Claims), but directly, by operation of law, as a means for determining damages for breach.

The Determination by this Court that *Burton Coal* Applies to the Contract at Issue Does Not Require this Court to Redetermine Any Fact Found by the Court of Claims

Respondent's principal argument is that the market value rule applied in *Burton Coal* does not apply here because the contract did not permit petitioner to obtain suppliers on the market. This statement of petitioner's rights under the contract is said to be a "factual determination" based upon "specific and detailed findings of the Court of Claims." Therefore, the case is said to present only the correctness of findings below (Br. 11-12). This is not true.

The interpretation of a contract, while it may depend upon factual determinations, is not itself a factual determination, but a determination of law. Moreover, respondent gives no reference to the "specific or detailed

findings" that "[n]one of the contract provisions could be interpreted [as] requiring petitioner to open up additional mines or to expand its milling facilities." Pet. App. 25a. That finding is not challenged. Rather, the district court concluded that petitioner's obligation to "use its best efforts to produce and sell" tungsten ore "to the end that the purposes intended to be served by the contract as such" could be fulfilled only by opening up additional mines. Pet. App. 25a-26a. But the district court did not explain how the purposes intended to be served by a contract could be the same as the obligations of the contract. Nor do the findings support respondent's claim. The evidence speaks of what the parties intended when they made the negotiations, not of the rights and obligations expressed in the contract.

While expressions by the parties during the course of negotiations may serve to elucidate ambiguous contract terms, this contract is not ambiguous, nor does respondent claim that it is. The truth is that the negotiators understood very well that their mutual purposes would best be served by a long-term purchase and sale agreement, not a development contract. The contract went through several drafts prepared by experienced Government lawyers. Language obligating petitioner to open up mines and provide additional milling facilities and restricting the source of deliveries was inserted in the first draft by a DMEA attorney who was unfamiliar with the prior negotiations. Upon objection by one of petitioner's representatives this language was rewritten to express simple obligations to buy and sell (Pet. App. 97a-98a, fn. 6).

The Court of Claims concluded that petitioner did not waive its right to deliver tungsten bought in the market "to a minor extent" (Pet. App. 25-26a), but this can hardly be called a factual determination, or even a reasonable inference. The conclusion was not predicated upon the terms of the contract but upon the court's view that it was one of the Government's prime purposes in making

the contract to make possible the opening up and development of new sources of tungsten." Petitioner contends that this was one of the Government's prime purposes, the other being to satisfy the pressing needs of its stockpile, but submits that the purposes which motivated the parties to enter into the contract ought not to be confused with the obligations which they assumed. This basic confusion of purpose with obligation has resulted in the plainly erroneous legal conclusion (Pet. 11-15) which this Court may and should review.

Nor is petitioner merely asking this Court to review an erroneous interpretation of a contract. The error in interpretation was part and parcel of the refusal to apply *Burton Coal*. The Court of Claims knew very well that petitioner was relying on *Burton Coal*. The commissioner's opinion and petitioner's briefs and oral argument repeatedly thrust *Burton Coal* upon the court's notice as presenting the principal issue in the case. This is what makes it strange that the court not only failed to discuss or adopt any of the various arguments suggested by the commissioner to get around *Burton Coal*, but did not even allude to the case in its opinion. Petitioner submits that it should not be possible to avoid review of a determination of law in conflict with *Burton Coal* by reading into a contract restrictions and obligations for which there are no legal basis.

The Parties' Purposes Did Not Preclude Acquisition of Portuguese Tungsten at Market Prices

Even if the purposes with which the parties contracted are, erroneously, treated as obligations of the contract, they do not justify a departure from the rule of *Burton Coal*. The purposes have, however, been misstated in respondent's brief.

Nor can it be concluded that petitioner could not have purchased at market prices from mines it selected as suppliers. The Court of Claims found that petitioner might have acquired substantial quantities of tungsten ores at prices below the 60 escudos per kilogram ($29.31 per short ton unit) mentioned in commitments from some of such mines (162). But these commitments covered only a small part of the ore to be acquired by petitioner (8). Nor was petitioner committed to them. It was free to develop whatever mines offered the best prospects among the 800 registered and proven concessions. The Government did not specify, nor did it care, what mines petitioner chose. That is why the Court of Claims could not be specific and could do no better than refer to "the mines from which the parties understood that it [tungsten] was to be obtained" (Pet. App. 26).

In sum, while it was the mutual goal to increase Portuguese production, the instrument was simply a long-term purchase contract which gave petitioner the power to work towards the desired goal. The manner of accomplishment was left to petitioner. This was not a development contract. Neither was it a production contract. Petitioner was a middleman free to select its own suppliers. The Government lent no money and granted no premiums. It required strict adherence to a schedule of minimum deliveries. Failure of its sources would not excuse petitioner.

It is difficult to understand respondent's contentions (Resp. 15-17) that the foregoing purposes, even if erroneously treated as contractual obligations, distinguish the situation from *Barton Coal*. Respondent notes that in the Barton contract the seller might, under appropriate circumstances, furnish coal from mines other than those particularly named in the contract. But here petitioner from the outset could supply tungsten purchased from any of 880 concessions. Respondent notes that in Barton the seller "was bound to deliver the quantity of coal covered by the contract", but petitioner here was equally bound to deliver the quantity of tungsten specified in its contract.

Respondent goes on to speculate that in *Barton* the Government's essential purpose was to obtain coal, and the designated sources were merely incidental, not crucial, whereas here the crucial element was the development of new sources of tungsten. If so, why did it not only omit any obligation for development but agree to remove even a general reference to mines from the terms of the Atlantica contract? Even the preamble to the Atlantica contract, on which respondent rests its position, discloses the Government's conjoint desire of "procuring tungsten concentrates in quantity."

It is just as true here as in *Barton* that the only parties to the contract were the Government and the selling company, that no contract relation existed between the Government and any of the mining companies, and that their default would not make them liable to the Government or relieve the selling company from its obligation to deliver (273 U. S. at 340).

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tungsten for stockpiling. The negotiations were transferred to the DMEA panel for technical reasons (Pet. 4). DMEA had authority under the Defense Production Act and by Executive Order to make straight purchase contracts as well as loans and developmental contracts (Sec. 302(a)(1) of Finding 16 and Sec. 303 of E.O. No. 10281, Finding 18(c)).

pose to buy on the market was of controlling significance. But this premise is erroneous because it misses the whole point of *Burton Coal*. The market value rule there is applied by operation of law without regard to the cost of performance or amount of profits (273 U. S. at 344). Both were held in that case to be immaterial.

The Rule in *Burton Coal* is the Accepted Rule for the Buyer's Breach of a Sales Contract

Petitioner rejects as unsound the statement by respondent that there are no rules of damages but "only flexible guides dependent upon the particular factual circumstances involved" (Resp. 14). It is true that different rules may prevail in different situations, illustrated by the cases which respondent cites; but this does not mean that no rules exist. The market value rule is the accepted rule for the buyer's breach of a sales contract. Uniform Sales Act, 64(3); 3 Williston, *Sales* (rev. ed. 1948) 582. The rule is applied to anticipatory breaches as well as to refusals to accept delivery when due, e.g. *Eugene B. Smith & Co., Inc.*, 212 F. 2d 338, 340 (5th Cir. 1954). It was so applied in *Burton Coal* by this Court, which called it a "rule of law" (273 U. S. at 340) and refused to limit the seller's recovery to the difference between the contract price and the probable cost of performance.

Petitioner submits that the established rule, adopted by this Court as the law of Government contracts, may not be disregarded or upset by the Court of Claims.

Respondent suggests that the Government's motive for cancelling this contract, characterized as its "honest belief" that petitioner was speculating, justifies a departure from *Burton Coal*, where the Government's "apparent" motive was to profit from a drop in the market price (Resp. 17-18). Assessment of the relative depravity of the Govern-

ment's various bonuses would certainly afford a "[illegible] good" for setting damages, but hardly a reliable one. In any event, the motive for cancellation has no bearing on the application of the market value rule. Petitioner is not seeking punitive damages. This Court in *Reading Co.* did not deem the Government's motive worthy of comment. As for its "shoot-hole" hope, the Court of Claims found that the administrative determination to forego enforcement of the contract for purposes of speculation was "reasonable and not [illegible]" (143a-144a).

Equally without basis in the findings is respondent's assertion that application of the market value rule would give petitioner a windfall of more than $5,000,000 (Resp. 18). The findings conclude that the assumed costs of performance were maximum costs based on fragmentary evidence (162a-163a, 167a-168a). Discussing the anticipated remission of Portuguese export taxes, the Court said:

> "Absent the tax, Atlantica might have made a profit in excess of $5 million." (167a-168a, fn. 7a)

The windfall argument, which in any event is untenable because this Court disposed of it as immaterial in *Reading Co.* (273 U. S. at 331), is therefore not available to respondent in this case.

The utter inadequacy of the damages found by the Court of Claims, even under its theory, is the reason why petitioner seeks, alternatively, an opportunity to establish at least its out-of-pocket damages on the basis which that court has adopted (Pet. 11-15). The difficulty of making such proof—a difficulty caused by respondent's repudiation of its obligations at the very outset of a [illegible]

your contract permitting, even under the court's theory, complete freedom to petitioner in the selection of its suppliers and terms of supply. It demonstrates the wisdom of the policy underlying the market value rule followed by this Court in *Eastern Coal*.

CONCLUSION

For the reasons given it is submitted that the Court should grant this petition.

Respectfully submitted,

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